

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
August 15, 2006 Session

**CHRISTOPHER SCOTT EVERETT v. KERRY KATHLEEN EVERETT**

**Appeal from the Chancery Court for Cheatham County**  
**No. 12126     Leonard W. Martin, Judge**

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**No. M2005-00934-COA-R3-CV - Filed on May 3, 2007**

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In this appeal from a final order of divorce, the wife appeals the trial court's designation of the husband as the primary residential parent, identification of marital assets and allocation of marital debt, denial of transitional alimony, and calculation of the wife's child support obligation. We affirm the trial court's residential placement arrangement as reflected in the agreed parenting plan and also affirm the designation of the husband as primary residential parent. In addition, we affirm the trial court's classification of the husband's father's financial assistance to purchase the marital home as a debt rather than a gift; the trial court's denial of the wife's request for transitional alimony; and the trial court's decision regarding the wife's earning capacity for purposes of setting child support. However, we have determined that the trial court erred by allocating to the wife part of the responsibility for the repayment of the husband's student loans.

**Tenn. R. App. P.3 Appeal as of Right; Judgment of the Chancery Court**  
**Affirmed in Part, Modified in Part**

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and WILLIAM B. CAIN, J., joined.

Thomas F. Bloom, Nashville, Tennessee, for the appellant, Kerry Kathleen Everett.

Donna L. Green, Brentwood, Tennessee, for the appellee, Christopher Scott Everett.

**OPINION**

Christopher Scott Everett ("Husband") and Kerry Kathleen Everett ("Wife") were married on February 7, 1997, after dating since the early 1990s. Seven years later, on May 21, 2004, Husband filed for divorce. Wife counterclaimed. Pending a final hearing, various disputes were brought to the court and resolved by interlocutory order. The case was tried over two days in December 2004 and January 2005. In its final order, the trial court granted divorce to both parties on the ground of inappropriate marital conduct by each. The court also divided marital property and debt, denied Wife's request for alimony, adopted the Permanent Parenting Plan agreed upon by the

parties for the couple's minor daughter, designated Father as primary residential parent, and ordered Wife to pay \$333 per month in child support.

Wife appeals claiming that the trial court erred in four areas. First, Wife claims Husband should not have been designated the primary residential parent or awarded ultimate authority to make decisions for the couple's child. Second, Wife claims that in its allocation of the marital property and debt, the trial court erred with regard to two matters: (a) designating money from Husband's father used to purchase the couple's home as a loan instead of a gift and (b) allocating to Wife a portion of Husband's student loan debt. Third, Wife claims the court erred by failing to grant her transitional alimony. Finally, Wife argues the trial court erred in imputing to her an annual income of \$27,000 for the purposes of calculating her child support obligation.

### **I. STANDARD OF REVIEW**

The trial court's conclusions of law are reviewed "under a pure *de novo* standard of review according no deference to the conclusions of law made by the lower courts." *Kendrick v. Shoemaker*, 90 S.W.3d 566, 569-70 (2002); *Southern Constructors, Inc. v. Loudon County Bd. of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001). Our review of the trial court's findings of fact is *de novo* upon the record, accompanied by a presumption of correctness, unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *Kendrick*, 90 S.W.3d at 569-70; *Hass v. Knighton*, 676 S.W.2d 554, 555 (Tenn. 1984). When the trial court makes no specific findings of fact, however, we must review the record to determine where the preponderance of the evidence lies. *Kendrick*, 90 S.W.3d at 569-70; *Ganzevoort v. Russell*, 949 S.W.2d 293, 296 (Tenn. 1997).

### **II. DESIGNATION OF PRIMARY RESIDENTIAL PARENT**

The trial court found in its Final Decree of Divorce that Husband "has acted more responsibly and demonstrated better judgment in making decisions involving the parties' minor child than the Wife." Consequently, Husband was designated the primary residential parent. The agreed upon Permanent Parenting Plan incorporated into the decree provided a visitation schedule in which the parties agreed that summers and holidays were evenly split between them but that during the school year, the primary residential parent has the child slightly more often.<sup>1</sup> The parties worked out this visitation schedule without knowing who the court would designate as the primary residential parent.

Mother appeals Father's designation as primary residential parent and his designation as the parent with ultimate decision making authority. The Permanent Parenting Plan provides that each parent is to make decisions about the day-to-day care and control of the child while the child resides

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<sup>1</sup>At oral argument, counsel for Wife argued that Wife also disputed the division of residential time with the child. The record shows the trial court asked the parties to work out a visitation schedule between them without knowing whom the trial court would designate as the primary residential parent. The parties agreed upon the residential time allocated between the residential and non-residential parent. Wife alleges no basis to disrupt her agreed upon arrangement. Furthermore, even if there was no actual agreement about the residential schedule, we find the trial court's allocation of residential time to be without error.

with him or her. Both have authority to make emergency decisions about the health and safety of the child. In the event the parents cannot agree, however, Husband has the authority to make the ultimate decisions about education, health care, religion, and extracurricular activities.

According to Wife, the factors to be used to fashion residential schedule in Tenn. Code Ann. § 36-6-404(b) favor her. That section provides in pertinent part:

. . . the court shall make residential provisions for each child, consistent with the child's developmental level and the family's social and economic circumstances, which encourage each parent to maintain a loving, stable, and nurturing relationship with the child. The child's residential schedule shall be consistent with this part. If the limitations of § 36-6-406 are not dispositive of the child's residential schedule, the court shall consider the following factors:

- (1) The parent's ability to instruct, inspire, and encourage the child to prepare for a life of service, and to compete successfully in the society which the child faces as an adult;
- (2) The relative strength, nature, and stability of the child's relationship with each parent, including whether a parent has taken greater responsibility for performing parenting responsibilities relating to the daily needs of the child;
- (3) The willingness and ability of each of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent, consistent with the best interests of the child;
- (4) Willful refusal to attend a court-ordered parent education seminar may be considered by the court as evidence of that parent's lack of good faith in these proceedings;
- (5) The disposition of each parent to provide the child with food, clothing, medical care, education, and other necessary care;
- (6) The degree to which a parent has been the primary caregiver, defined as the parent who has taken the greater responsibility for performing parental responsibilities;
- (7) The love, affection, and emotional ties existing between each parent and the child;
- (8) The emotional needs and developmental level of the child;
- (9) The character and physical and emotional fitness of each parent as it relates to each parent's ability to parent or the welfare of the child;
- (10) The child's interaction and interrelationships with siblings and with significant adults, as well as the child's involvement with the child's physical surroundings, school, or other significant activities;
- (11) The importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment;
- (12) Evidence of physical or emotional abuse to the child, to the other parent or to any other person;

- (13) The character and behavior of any other person who resides in or frequents the home of a parent and such person's interactions with the child;
- (14) The reasonable preference of the child if twelve (12) years of age or older. . . .
- (15) Each parent's employment schedule, and the court may make accommodations consistent with those schedules; and
- (16) Any other factors deemed relevant by the court.

Because of the broad discretion given trial courts in matters of child custody, visitation, and related issues and because of the fact specific nature of such decisions, appellate courts are reluctant to second-guess a trial court's determination regarding custody and visitation. *Parker v. Parker*, 986 S.W.2d 557, 563 (Tenn. 1999); *Nelson v. Nelson*, 66 S.W.3d 896, 901 (Tenn. Ct. App. 2001); *Gaskill v. Gaskill*, 936 S.W.2d 626, 631 (Tenn. Ct. App. 1996)). Accordingly, this court will decline to disturb a parenting arrangement fashioned by a trial court unless that decision is based on the application of incorrect legal principles, is unsupported by a preponderance of the evidence, or is against logic or reasoning. *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001); *Adelsperger v. Adelsperger*, 970 S.W.2d 482, 485 (Tenn. Ct. App. 1997).

The testimony of Husband and Wife reveal a significant divergence of views regarding the judgment and parenting skills of the other. Both parents paint the other as excessive partyers who continued to use illegal drugs after the birth of their daughter in 2000. We see no need to recount the various allegations each made against the other and certainly no benefit to the parties or, particularly, their child. The trial court, however, specifically found Wife's testimony to lack credibility:

I haven't been terribly impressed with the credibility of some of the witnesses. And I especially find [Wife's] testimony to not be credible. She tells the facts in some regard, but it's obvious to me that she's straining not to tell it in other matters. And that was real obvious prior to any inconsistencies in her testimony in correlation to her manner and demeanor on the witness stand.

Without going through the details, given this finding about Wife's credibility, we have no choice but to discount her denials about her lifestyle. Based upon Husband's testimony there is sufficient evidence in the record to support the trial court's finding that Husband has demonstrated better judgment about the child and should be the primary residential parent with decision making authority.

### **III. DIVISION OF MARITAL PROPERTY**

Upon the dissolution of a marriage, courts are called upon to divide the assets the parties accumulated during the marriage, upon the request of either party. First, the parties' property interests must be identified. 19 W. Walton Garrett, *Tennessee Practice: Tennessee Divorce, Alimony and Child Custody*, § 15:2, at 321 (rev. ed. 2004). The court's next task is to classify the parties' property as either separate or marital, because only marital property is subject to equitable

distribution. *Flannary v. Flannary*, 121 S.W.3d 647, 650 (Tenn. 2003); *Eldridge v. Eldridge*, 137 S.W.3d at 1, 13 (Tenn. Ct. App. 2002).

After identifying the marital property, the trial court is charged with equitably dividing, distributing, or assigning the marital property in “proportions as the court deems just.” Tenn. Code Ann. § 36-4-121(a)(1); *Jolly v. Jolly*, 130 S.W.3d 783, 785 (Tenn. 2004). The court is to consider all relevant factors in its distribution, including those listed in Tenn. Code Ann. § 36-4-121(c).<sup>2</sup> *Jolly*, 130 S.W.3d at 786; *Flannary*, 121 S.W.3d at 650. The court may consider any other factors necessary in determining the equities between the parties, Tenn. Code Ann. § 36-4-121(c)(11), except that division of marital property is to be made without regard to marital fault. Tenn. Code Ann. § 36-4-121(a)(1).

Decisions regarding division of marital property are fact-specific, and many circumstances surrounding the property and the parties play a role. A trial court has a great deal of discretion concerning the manner in which it divides marital property. *Jolly*, 130 S.W.3d at 785; *Flannery*, 121 S.W.3d at 650; *Smith v. Smith*, 984 S.W.2d 606, 609 (Tenn. Ct. App. 1997). Appellate courts ordinarily defer to the trial court’s decision unless it is inconsistent with the factors in Tenn. Code Ann. §36-4-121(c) or is not supported by a preponderance of the evidence. *Jolly*, 130 S.W.3d at 785-86.

#### **a) Loan from Husband’s father to purchase home**

In the course of dividing the marital debts and assets, the trial court found that Husband’s father had loaned Husband \$170,000 to purchase the marital home. The trial court consequently, treated this as one of Husband’s debts. Wife, on the other hand, argues that the loan, is in fact, a gift so that in dividing the parties property, the value of the marital home should be included in the marital estate and reapportioned between them.

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<sup>2</sup>These factors are:

- (1) The duration of the marriage;
- (2) The age, physical and mental health, vocational skills, employability, earning capacity, estate, financial liabilities and financial needs of each of the parties;
- (3) The tangible or intangible contribution by one (1) party to the education, training or increased earning power of the other party;
- (4) The relative ability of each party for future acquisitions of capital assets and income;
- (5) The contribution of each party to the acquisition, preservation, appreciation, depreciation or dissipation of the marital or separate property, including the contribution of a party to the marriage as homemaker, wage earner or parent, with the contribution of a party as homemaker or wage earner to be given the same weight if each party has fulfilled its role;
- (6) The value of the separate property of each party;
- (7) The estate of each party at the time of the marriage;
- (8) The economic circumstances of each party at the time the division of property is to become effective;
- (9) The tax consequences to each party, costs associated with the reasonably foreseeable sale of the asset, and other reasonably foreseeable expenses associated with the asset;
- (10) The amount of social security benefits available to each spouse; and
- (11) Such other factors as are necessary to consider the equities between the parties.

Wife, however, pointed to no evidence to substantiate this allegation. The trial court was presented with a Letter of Agreement dated in 1995, signed by Husband and his father, which provided some of the terms of the loan agreement including that payments were to begin ten (10) years after the purchase date. The \$170,000 check to Husband specifically provided on its face that it was for a loan. Given the contemporaneous documents evidencing the intent to make a loan and Wife's failure to cite any contrary evidence, we find the preponderance of the evidence supports the trial court's finding.

#### **b) Husband's Student Loan**

In its division of marital property and marital debts, the trial court assigned a portion of Husband's student loan debt to Wife.

The Court also finds that the student loans in Husband's name incurred during the marriage in the amount of \$81,175.00 are marital debt because the funds were used to provide for the living expenses of the parties rather than Husband's tuition. As distribution of marital property, the Wife should pay \$26,182.00 of said student loan debt and Husband should pay the remainder of the student debt.

In allocating debt, courts are to consider the following four factors: "(1) the debt's purpose; (2) which party incurred the debt; (3) which party benefitted from incurring the debt; and (4) which party is best able to repay the debt." *Alford v. Alford*, 120 S.W.3d 810, 813 (Tenn. 2003).

Wife claims she is economically disadvantaged. At the time of the trial, Husband earned \$57,600 as a historical consultant due in part to the graduate degree funded by the student loans. Wife has an undergraduate degree in art history. Wife has not worked outside the home since the birth of their daughter since the couple agreed that she would stay at home to care for their daughter. While the student loans supported both Husband and Wife, Wife also contributed to their finances through money provided by her parents. Wife has worked part time cleaning houses and babysitting. She has lived on inheritance from her father which is almost gone.

The trial court allocated a portion of this student loan debt to Wife since the loan proceeds had benefitted her, *i.e.*, she lived off the proceeds of the loan with Husband while he was in school. Although Wife may have benefitted while Husband was in school, the education the student loans financed will benefit Husband for the remainder of his life. The purpose of the debt was to provide Husband an education from which he derives the far greater benefit. Wife delayed pursuing further degrees while Husband was in school earning his Ph.D., caring for the parties' child and home. In addition, during this time it is undisputed that Wife's parents contributed significantly to the couple's living expenses. Based upon the record before us, we believe the trial court erred in its application of the *Alford* factors. It is our conclusion that the entire student loan debt for Husband's education should have been allocated to Husband. On this point alone, the trial court is reversed, and the entire student loan debt is allocated to Husband.

#### IV. TRANSITIONAL ALIMONY

Trial courts have broad discretion to determine whether spousal support is needed and, if so, its nature, amount and duration. *Bratton v. Bratton*, 136 S.W.3d 595, 605 (Tenn. 2004); *Burlew v. Burlew*, 40 S.W.3d 465, 470 (Tenn. 2001). There are no hard and fast rules for spousal support decisions. *Manis v. Manis*, 49 S.W.3d 295, 304 (Tenn. Ct. App. 2001). Appellate courts are generally disinclined to second-guess a trial court's spousal support decision unless it is not supported by the evidence or is contrary to public policies reflected in applicable statutes. *Nelson v. Nelson*, 106 S.W.3d 20, 23 (Tenn. Ct. App. 2002); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001).

Our role is to determine whether the award reflects a proper application of the relevant legal principles and that it is not clearly unreasonable. *Bogan*, 60 S.W.3d at 783. It is not our role to fine tune a trial court's spousal support award. *Fox v. Fox*, No. M2004-02616-COA-R3-CV, 2006 WL 2535407, at \*9 (To Tenn. R. App. P. 11 application filed); *Hartman v. Hartman*, No. E2000-01927-COA-R3-CV, 2001 WL 823188, at \*7 (Tenn. Ct. App. July 20, 2001) (No Tenn. R. App. P. 11 application filed). When the trial court has set forth its factual findings in the record, we will presume the correctness of those findings so long as the evidence does not preponderate against them. Tenn. R. App. P. 13(d); *Bogan*, 60 S.W.3d at 727; *Crabtree v. Crabtree*, 16 S.W.3d 356, 360 (Tenn.2000).

Spousal support decisions require a careful balancing of the relevant factors, and the determinations hinge on the unique facts of each case. *Robertson v. Robertson*, 76 S.W.3d 337, 341 (Tenn. 2002). Tenn. Code Ann. § 36-5-121(c)(1) governs spousal support and provides in pertinent part as follows:

(c)(1) Spouses have traditionally strengthened the family unit through private arrangements whereby one (1) spouse focuses on nurturing the personal side of the marriage, including the care and nurturing of the children, while the other spouse focuses primarily on building the economic strength of the family unit. This arrangement often results in economic detriment to the spouse who subordinated such spouse's own personal career for the benefit of the marriage. It is the public policy of this state to encourage and support marriage, and to encourage family arrangements that provide for the rearing of healthy and productive children who will become healthy and productive citizens of our state.

...

(g)(1) Transitional alimony means a sum of money payable by one (1) party to, or on behalf of, the other party for a determinate period of time. Transitional alimony is awarded when the court finds that rehabilitation is not necessary, but the economically disadvantaged spouse needs assistance to adjust to the economic

consequences of a divorce, legal separation or other proceeding where spousal support may be awarded, such as a petition for an order of protection.

In determining whether to award support and the nature, amount and length of such support, the court is to consider all relevant factors, including those enumerated in Tenn. Code Ann. § 36-5-121(i).<sup>3</sup> *Id.*

Among the factors to be considered by the courts in making spousal support decisions, the two considered to be the most important are the disadvantaged spouse's need and the obligor spouse's ability to pay. *Bratton*, 136 S.W.3d at 604; *Robertson*, 76 S.W.3d at 342; *Bogan*, 60 S.W.3d at 730. The statutory factors to be considered include the relative earning capacity, obligations, needs, and financial resources of each party; the relative education and training of each party; the ability and opportunity and necessity of each party to secure such education and training in order to improve such party's earning capacity to a reasonable level; and the assets of each party, whether they be separate assets or marital property awarded in the divorce. Tenn. Code Ann. § 36-5-101(d)(1)(E).

Based on the record before us, we find the trial court's decision is supported by the evidence. While Wife's current income is limited because she has chosen to take housekeeping and babysitting jobs, she has a college degree. She asserts she needs an advanced degree to earn a reasonable salary in her field. Nonetheless, we conclude the trial court's denial of transitional alimony was not in error.

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<sup>3</sup>Such factors are:

- (1) The relative earning capacity, obligations, needs and financial resources of each party including income from pension, profit sharing or retirement plans and all other sources;
- (2) The relative education and training of each party, the ability and opportunity of each party to secure such education and training, and the necessity of a party to secure further education and training to improve such party's earning capacity to a reasonable level;
- (3) The duration of the marriage;
- (4) The age and mental condition of each party;
- (5) The physical condition of each party, including, but not limited to, physical disability or incapacity due to a chronic debilitating disease;
- (6) The extent to which it would be undesirable for a party to seek employment outside the home because such party will be custodian of a minor child of the marriage;
- (7) The separate assets of each party, both real and personal, tangible and intangible;
- (8) The provisions made with regard to the marital property as defined in § 36-4-121;
- (9) The standard of living of the parties established during the marriage;
- (10) The extent to which each party has made such tangible and intangible contributions to the marriage as monetary and homemaker contributions, and tangible and intangible contributions by a party to the education, training or increased earning power of the other party;
- (11) The relative fault of the parties in cases where the court, in its discretion, deems it appropriate to do so; and
- (12) Such other factors, including the tax consequences to each party, as are necessary to consider the equities between the parties.



Additionally, we have granted Wife relief from the marital debt allocated to her by the trial court, improving her financial outlook.

#### **V. WIFE'S INCOME**

Wife argues that the trial court erred when it imputed income to her for purposes of establishing child support obligations. The trial court made the following finding:

The child needs, and the Wife has the ability to pay, support to the Husband in the amount of \$333.00 per month, beginning April 1, 2005, for the support of the minor child. The Court finds that the Wife is capable of earning at least \$27,000.00 per year (\$2,250 per month) based upon her education and experience. The Tennessee Child Support Guidelines have been complied with in this case and the completed Child Support Worksheet is on file with the Court and incorporated herein by reference.

While the trial court may “impute” income under specific circumstances, in this case the trial court simply credited Wife’s testimony about her earning capacity. The trial court’s finding was based on Wife’s testimony when questioned by Husband’s counsel and the court. Wife testified that with her bachelor’s degree she could earn \$27,000 a year. While she testified that in the past her income was only \$15,000 per year, it does not detract from her testimony about her earning potential. There is evidence in the record to support the trial court’s conclusion, and it is affirmed.

The trial court’s allocation of Husband’s student loan debt is modified to allocate the entire amount to Husband. The trial court’s order is otherwise affirmed in all respects. Costs of this appeal are equally divided between the parties.

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PATRICIA J. COTTRELL, JUDGE